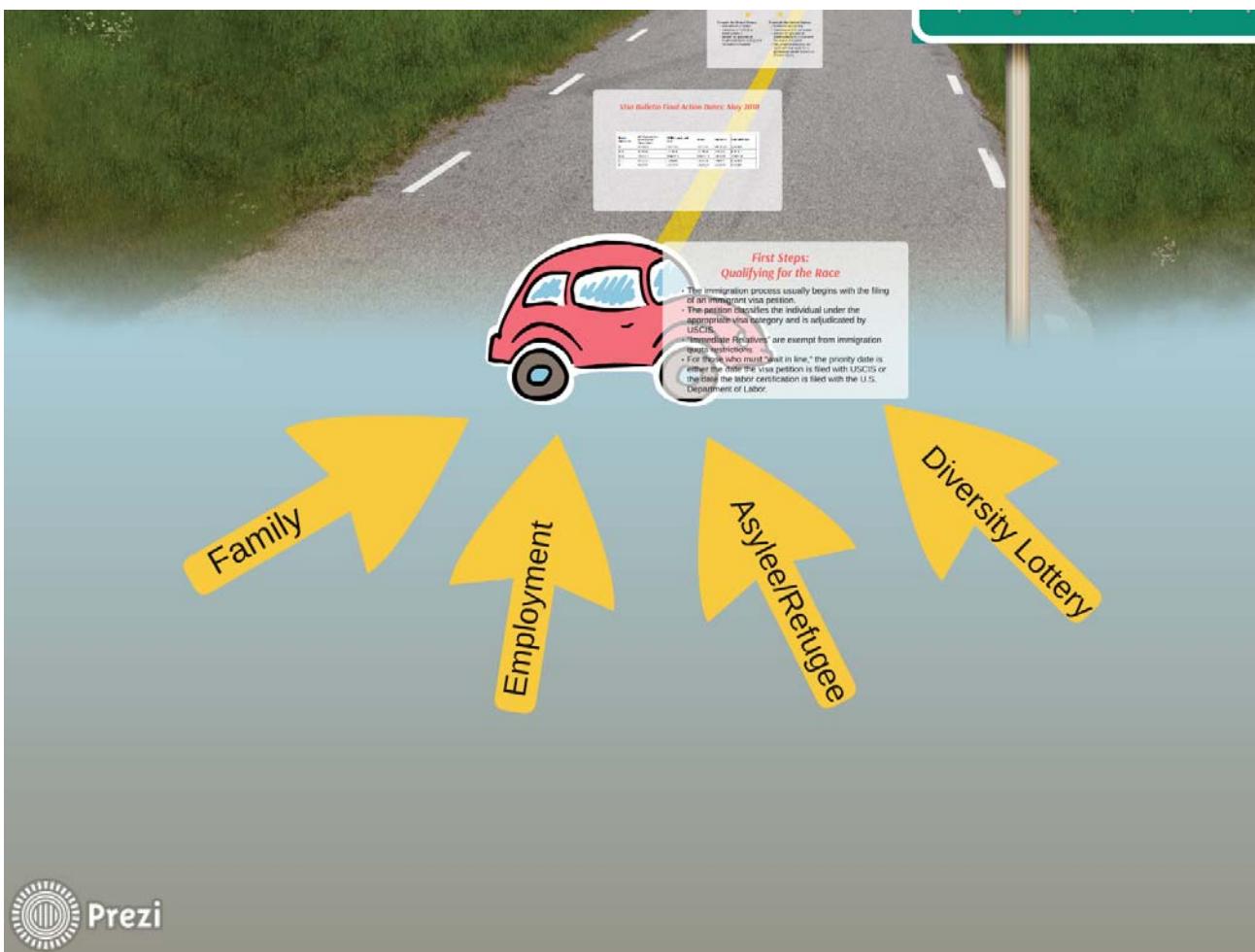
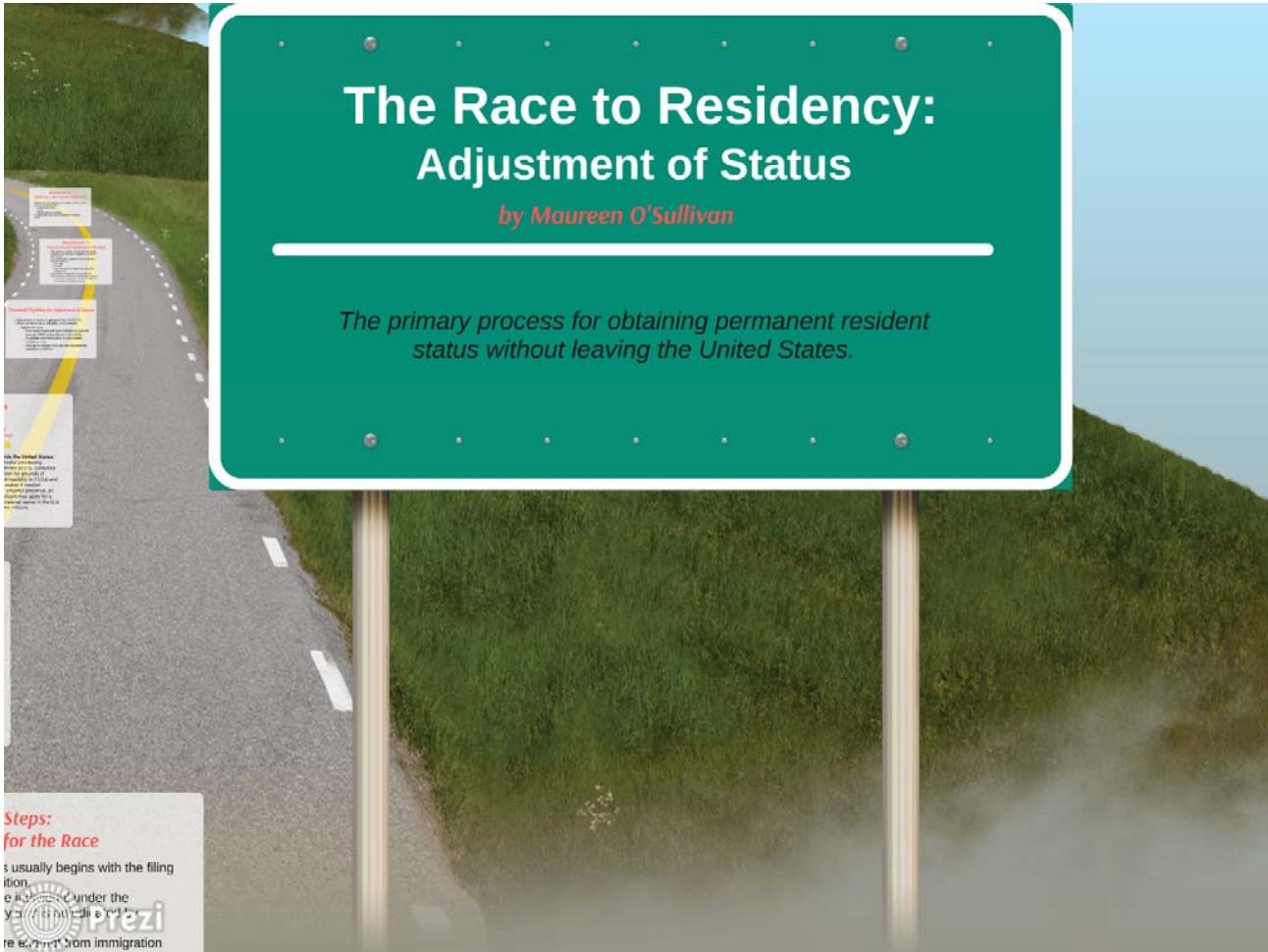




The Race to Residency: Adjustment of Status

by Maureen O'Sullivan

The primary process for obtaining permanent resident status without leaving the United States.



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First Steps: Qualifying for the Race

- The immigration process usually begins with the filing of an immigrant visa petition.
- The petition classifies the individual under the appropriate visa category and is adjudicated by USCIS.
- “Immediate Relatives” are exempt from immigration quota restrictions.
- For those who must “wait in line,” the priority date is either the date the visa petition is filed with USCIS or the date the labor certification is filed with the U.S. Department of Labor.



Visa Bulletin Final Action Dates: May 2018

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	08APR11	08APR11	08APR11	15NOV96	22JAN06
F2A	01JUN16	01JUN16	01JUN16	22APR16	01JUN16
F2B	15MAY11	15MAY11	15MAY11	01DEC96	15DEC06
F3	01FEB06	01FEB06	01FEB06	01SEP95	01APR95
F4	01OCT04	01OCT04	01MAR04	08JAN98	01FEB95



Visa Petition



*Await Visa Availability
(except Immediate Relatives)*



If *inside* the United States:

- Adjustment of status
- Interview w/ USCIS or hearing with IJ
- Screen for grounds of inadmissibility in 212(a) and file waiver if needed

If *outside* the United States:

- Consular processing
- Interview at U.S. consulate
- Screen for grounds of inadmissibility in 212(a) and file waiver if needed
- For unlawful presence, an applicant may apply for a provisional waiver in the U.S. (Form I-601A).



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Threshold Eligibility for Adjustment of Status

- Adjustment of status is governed by INA § 245.
- There are three basic eligibility requirements.
 - Applicants must:
 - have been inspected and admitted or paroled (except VAWA self-petitioners and SIJs);
 - be eligible and admissible for permanent residence; and
 - have an immigrant visa number immediately available to him/her.



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Requirement #1: Inspected and Admitted or Paroled

- The adjustment applicant must have been legally admitted or paroled by an immigration officer at a port of entry.
- The requirement is usually met by submitting the following evidence:
 - I-94 Card
 - Passport
 - Other relevant travel documents, e.g. border crossing card
- Additionally, the respondent may satisfy the requirement by showing that he/she was “waved in.”
 - Respondent must prove “procedural regularity,” and may do so through testimony.

Requirement #2: Eligible for a Visa and Not Inadmissible

Requires that the applicant is not subject to INA § 212(a) grounds of inadmissibility:

- Criminal convictions
- Fraud
- Prior immigration violations

If inadmissible, applicant must qualify for and file a waiver

Requirement #3: Visa Immediately Available

Satisfied in two ways:

- The priority date for the visa is current (as shown in Visa Bulletin)
- OR the applicant is immigrating in a category for which there is no waiting list (e.g., immediate relatives)



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Grounds of Disqualification for Adjustment (INA § 245(c))



- The grounds of disqualification for adjustment of status include:
 - Unauthorized employment
 - Failure to maintain nonimmigrant status
- Due to INA § 245(c) disqualifications, family-based adjustment is generally limited to immediate relatives and those "grandfathered" under INA § 245(i).
- Immediate relatives (spouses, parents, and children of U.S. citizens) are automatically forgiven for these violations.



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Forgiveness Provisions Enabling Adjustment: INA § 245(i)

- INA § 245(i) enables an individual to pay a \$1000 penalty to qualify for adjustment despite having entered without inspection or being ineligible under INA § 245(c).
- INA § 245(i) requires that the individual:
 - must have been the beneficiary of a visa petition or application for labor certification which was filed on or before April 30, 2001; and
 - must have been physically present in the U.S. on December 21, 2000 (unless the visa petition or labor certification was filed by January 14, 1998).

Grandfathering

- The term used to describe the process by which an individual gains the benefit of INA § 245(i) by virtue of an old visa petition or application for labor certification.
- The rules are extremely generous, especially with respect to spouses and children.

More on INA § 245(i)

- INA § 245(i) cures the following:
 - Entry without inspection
 - Unauthorized work
 - Failure to maintain status
- The provision DOES NOT cure grounds of inadmissibility listed in INA § 212(a):
 - Fraud
 - Crimes
 - Unlawful Presence Bars
- See INA § 245(k) for another forgiveness provision which enables adjustment in some employment-based cases

Derivatives: Family Members of Adjustment Applicants



- Derivatives are the spouses and children of the principal applicant.
- All of the preference categories, in both the family and employment-based preferences, have derivatives.
- Immediate relatives do not have derivatives.
- For adjustment of status, each derivative must also meet the eligibility requirements of INA § 245(a), AND must not be disqualified under the grounds listed in INA § 245(c) or be inadmissible under INA § 212(a).

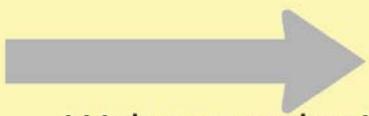
Typical Contents of the Adjustment Application

- Visa Petition Approval Notice (Form I-797)
- Application for Adjustment of Status (Form I-485)
 - Note: *The questions on the Form I-485 screen for inadmissibility under INA § 212(a)*
- Biographic Information Form (Form G-325)
- Identity Documents showing the relationship between the applicant and the petitioning relative
- Affidavit of Support
- Tax returns and sponsor identity documents
- Copy of Passport or I-94 card
- Form I-485A and \$1000 penalty for 245(i)
- Medical evaluation by recognized provider
- Waiver application (Form I-601) if applicable
- Receipts for payment of filing fees

Screening

- Every applicant, whether for adjustment of status or an immigrant visa, is screened according to the grounds of inadmissibility listed in INA § 212(a).
- If the applicant is inadmissible, he or she must file and qualify for the corresponding waiver of inadmissibility (if one exists) or face denial.

DETOUR



Waivers for Crime

- Waivers under INA § 212(h) are used to waive the following crimes:
 - Crimes involving moral turpitude (CIMTs)
 - Multiple offenses with an aggregate sentence of 5 years or more
 - Prostitution and commercialized vice
 - Criminal activity for which someone has asserted immunity
- Waivers under INA § 212(h) DO NOT waive most drug crimes
 - These waivers only waive one offense for simple possession of 30 grams or less of marijuana.



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Qualifying for a 212(h) Waiver

- Must prove hardship OR rehabilitation
- Hardship: requires that the applicant be a spouse, parent, son or daughter of a U.S. citizen or LPR. Must prove that the qualifying relative would suffer extreme hardship if the waiver was denied.
- Rehabilitation: requires the applicant to show:
 1. crime for which he/she is inadmissible that occurred more than 15 years ago;
 2. admission (or approval of adjustment of status) would not be contrary to the national welfare, safety and security of the U.S.; AND
 3. he or she has been rehabilitated.
- Additionally, the applicant may be required to meet a heightened standard in cases involving “violent or dangerous crimes.”



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212(h) Waivers for LPRs

- The waiver is available for LPRs even those convicted of aggravated felonies if they gained LPR by adjustment of status rather than consular processing
- May re-adjust in removal proceedings or
- May seek stand-alone 212(h) if she or he is an "arriving alien."

Fraud and Waiver for Fraud and Misrepresentation

- A waiver under INA § 212(i) requires a specific qualifying relative who would suffer extreme hardship if the waiver were to be denied.
- The waiver is ONLY available to an individual who is the spouse, son, or daughter of a U.S. citizen or lawful permanent resident.
 - Note: qualifying relatives more limited than with INA § 212(h) waiver for crimes



Waivers under INA § 212(c) for Permanent Residents with Crimes

- An old waiver which was repealed by IIRIRA in 1996
- Still available to lawful permanent residents with 7 years of lawful unrelinquished domicile in TWO situations:
 1. Permanent Residents with old convictions before April 24, 1996
 2. Individuals in deportation (as opposed to removal) proceedings
- A decision on the merits of a 212(c) waiver requires a balancing of the adverse factors against the social and human considerations in each case.
 - See Matter of Marin, 16 I&N Dec. 581 (BIA 1978)



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Unlawful Presence Bars and Waiver



Bars under INA § 212(a)(9)(B)(i):

- An individual who accumulates more than 180 days, but less than 1 year of unlawful presence, departs the U.S. and then seeks to reenter (or adjust) is subject to a 3-year bar.
- An individual who accumulates a year or more of unlawful presence, departs the U.S. and then seeks to reenter (or adjust) is subject to a 10-year bar.
- Individuals who have reentered without inspection are subject to a harsher bar contained in INA § 212(a)(9)(C)(i).
 - This bar cannot ordinarily be waived in the context of adjustment of status.



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Public Charge: *Affidavits of Support*

- Affidavits (Form I-864) are required in family-based adjustment cases.
- These affidavits constitute a binding contract between the sponsor and the U.S. government.
- Some people are exempt from this requirement:
 - Individuals who may be credited with 40 quarters of earnings by the Social Security Administration.
 - Children who will become U.S. citizens automatically upon adjustment of status.



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Discretion

- Adjustment of status is a discretionary remedy.
- Old case law makes it clear that adjustment should ordinarily be granted in the exercise of discretion. Some newer cases question this.
- If granted, the applicant becomes a permanent resident and receives a "green card."



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Standalone Waivers

- Waiver under INA § 212(h)
- Waives certain criminal grounds, except drug convictions (other than simple possession of 30g or less of marijuana only)
- LPR charged as "arriving alien" may seek standalone waiver. No need for adjustment of status
- Any LPR who previously adjusted status may still qualify to waive certain aggravated felonies.
- See *Matter of J-H-J-*, 26 I&N Dec. 563 (BIA 2015)

Fraud Waiver for LPRs

- INA § 237(a)(1)(H): Waives fraud in the acquisition of permanent residence
- Requires a qualifying relative (Respondent must be a spouse, parent, son, or daughter of USC or LPR)
- No form or filing fee
- Hardship is NOT required
- Applies to fraud in adjustment of status as well as immigrant visa.
 - *Matter of Agour*, 26 I&N Dec. 566 (BIA 2015)
- This is the only waiver for marriage fraud
- This waiver cannot waive other grounds of removability, such as crimes.
 - *Matter of Tima*, 26 I&N Dec. 839 (BIA 2016)

Waivers of Conditional Residence

INA § 216(c)(4)

- Waives conditions to residence by waiving a joint petition to remove the conditional basis of residence
- Three grounds
 - Extreme Hardship
 - Matter of Monroe, 26 I&N Dec. 428 (BIA 2014)
 - Good Faith Marriage since terminated
 - Good Faith Marriage and abuse or extreme cruelty by petitioner
- CIS has initial jurisdiction, waiver may be renewed before IJ
 - Matter of Mendes, 20 I&N Dec. 833 (BIA 1994);
Matter of Lemhammad, 20 I&N Dec. 216 (BIA 1991).
- Filed on Form I-751

